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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 165

SELINA ROMMEL, ET AL., *Petitioners*

v.

ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The findings of fact and conclusions of law of the district court (J.A. 55-64)[1] are unreported. The opinion of the United States Court of Appeals for the District of Columbia (Pet. App. A, pp. A1-A3) is reported at 301 F. 2d 544.

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[1] "J.A." refers to the Joint Appendix prepared for the court below and on file with this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1962. The petition for a writ of certiorari was filed on June 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether German citizens who resided in Germany during the period from December 7, 1941 until February 1946, and admittedly were at that time enemies under Section 2(a) of the Trading With the Enemy Act, were precluded from maintaining an action under Section 9(a) of the Act for the return of property which the claimants owned while they resided in Germany and which was vested by the United States in 1947 and 1950, at which dates they were living in Switzerland.

STATUTE INVOLVED

The pertinent provisions of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, are as follows:

> *Section 2.* The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
>
> * * * * * *

Section 5(b)(1), During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or persons as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may

perform any and all acts incident to the accomplishment or furtherance of these purposes * * *.

* * * * * *

Section 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United

States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

STATEMENT

This is a consolidated action involving four suits brought under section 9(a) of the Trading With the Enemy Act by the petitioners, who sought to recover certain property (interests in testamentary and *inter vivos* trusts) vested by the United States under vesting orders issued in 1947 and 1950.

Petitioner de Courten was born in Germany in 1907 (J.A. 66), possessing German and Swiss citizenship

(J.A. 22). She resided in Germany from 1920 until late in January 1946 (J.A. 21, 67, 86). From 1941 until 1942 she was a civilian employee of the German Army in the office of the Mail Censor. In November 1948, she renounced her German citizenship (J.A. 22).

The three Rommels were born in Germany as German citizens. Their father was a captain in the German Army during the years 1940-1944 (J.A. 91). Their parents died in 1944, after which they lived with their aunt, petitioner de Courten. Two of the Rommels became Swiss citizens in 1956 and one in 1958 (J.A. 58).

In 1945, petitioner de Courten obtained permission to visit Switzerland. In January 1946, she took the three Rommels to Switzerland, where they were living at the time the vesting orders were issued.

The trial court ruled that the petitioners, by leaving Germany in 1946, had terminated their enemy status and that, since they were living in Switzerland at the time of the vesting orders, they were eligible under Section 9(a) to maintain a suit for the recovery of vested property.

The court of appeals reversed and remanded the case with directions to dismiss the complaint for lack of jurisdiction. It held that the enemy status of the claimants did not terminate when they left Germany for Switzerland but continued to the time of the vesting orders, thus precluding a suit under Section 9(a). The court relied on its previous ruling in the case of *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923, certiorari denied, June 25, 1962, holding that the enemy status acquired by a Netherlands corporation during the war as a result of German military occupation of Holland did not terminate when the German occupation ended.

ARGUMENT

The court below held that petitioners, persons admittedly resident in Germany throughout World War II, were "enemies" within the meaning of Section 2(a) of the Trading with the Enemy Act and thus precluded, under Section 9(a) of the Act, from maintaining a suit to recover vested property. The decision is clearly correct, and the question presented is of little current importance at this late stage in the administration of the alien property program.[2] There is less reason to consider this case than the *La Mola* case, in which the Court denied certiorari only last Term. October Term, 1961, No. 907.

1. Petitioners argue that it would require a strained interpretation of the Trading with the Enemy Act to hold that the Custodian may seize property of one who was formerly resident in an enemy country but is living outside of the enemy's territory as of the time that the seizure is effectuated. We disagree, believing that the statutory authority for the Custodian's vesting orders in this case is clear. Before turning to a consideration of the statute, however, we deem it important to point out that this case does not raise the kind of problem which might be presented if the Custodian had seized property which the claimants acquired or accumulated *after* their departure from Germany. The property interests here in question were owned by the claimants throughout the war years, when they resided in Germany. Indeed, during the years preceding the vesting, those property interests were "frozen" under the

[2] More than 19,000 claims were filed administratively for the return of vested property. As of April 30, 1962, only 621 were still pending before the successor to the Alien Property Custodian.

foreign funds control provisions which this government had adopted in 1940 and 1941. Thus, petitioners' grievance comes down to the fact that the Custodian's vesting orders in respect of their property were issued at a somewhat later date than such orders were issued in the case of some others similarly situated. Since the Custodian's vesting powers had not expired at the time he acted in this case, this difference is not material.

Section 5(b) of the Trading with the Enemy Act, as amended by the Joint Resolution of May 7, 1940, 54 Stat. 179, and the First War Powers Act, 1941, 55 Stat. 839, conferred upon the President plenary powers to control, during periods of national emergency or war, transactions involving property subject to the jurisdiction of the United States in which foreign nationals had any interest. See *supra*, p. 3. It was pursuant to this authority that the President promulgated the executive orders which established the so-called "freezing" controls. Executive Order 8389, April 10, 1940, 5 F.R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F.R. 2897 (applying those controls to nationals of Germany among others). "The freezing order of June 14, 1941," as this Court has stated (*Propper* v. *Clark*, 337 U.S. 472, 484), "immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." As of June 14, 1941, on which date petitioners were admittedly residents of Germany and hence nationals of a designated enemy country, the

property involved in this litigation was immobilized for possible future vesting.

Section 5(b) authorized not only the "freezing" of property in which designated nationals had an interest but the vesting of such property "when, as, and upon the terms, directed by the President." By Executive Order 8785, the President authorized the Custodian to vest any property in which a German national had an interest on or after June 14, 1941.

The President's vesting powers under Section 5(b) did not abate upon the termination of the "shooting war", as petitioners expressly concede (Pet. 13). Indeed, as the court below noted, the Joint Resolution of Peace between the United States and Germany, 65 Stat. 451, adopted on October 19, 1951, provided that:

> *any property* or interest which prior to January 1, 1947, *was subject to vesting or seizure* under the provisions of the Trading With the Enemy Act of October 6, 1917, as amended, *or which has heretofore been vested or seized* under that Act * * * *shall continue to be subject to the provisions of that Act* in the same manner and to the same extent as if this resolution had not been adopted * * *. [Emphasis added.]

Since the property was lawfully seized, there remains only the question whether petitioners have a right to its return under Section 9(a)—a right available only to one who is not an "enemy, or ally of enemy." "Enemy" is defined in Section 2 of the Act to include specifically any "resident" of enemy territory. As this Court has stated, "The word 'enemy' * * * of course refers to the person who or corporation which fulfilled the definition of an enemy during the war," *Swiss Insurance Co.* v. *Miller*, 267 U.S. 42, 45; cf.

Bank Voor Handel En Scheepvaart, N.V. v. *Kennedy*, 288 F. 2d 375 (C.A. D.C.), certiorari denied, 366 U.S. 962.

In *Brownell* v. *Ochmichen*, 243 F. 2d 637 (C.A. D.C.), the court below, rejecting a claim under Section 9(a), upheld the Custodian's seizure of property effectuated after the claimant had left Germany and come to the United States.[3] This Court denied certiorari. 355 U.S. 842. More recently, the Court of Appeals upheld the seizure of property of a Netherlands corporation, effectuated after the termination of the German occupation of Holland, and held that a remedy under Section 9(a) was barred because the plaintiff corporation, during the war, had its situs in enemy-occupied territory. *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923.[4] This Court again denied review. October Term, 1961, No. 907, June 25, 1962. Mr. Justice Black noted his dissent from the denial of certiorari in *La Mola*, but on the specific ground that the Netherlands was a friendly country which had been overrun by enemy forces. In the instant case, as emphasized above, the claimants were residents of Germany throughout the period of active hostilities, and the property in question was owned by them during that same period.[5]

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[3] See also *Hansen* v. *Brownell*, 234 F. 2d 60 (C.A. D.C.).

[4] As the Court of Appeals there noted, investigation of the status of property to determine the extent, if any, of the foreign interest is often a time-consuming process.

[5] The Court of Appeals did not find it necessary to reach the question whether petitioner de Courten was also an enemy because of her employment by the German Army. We reserve the right to urge this alternative ground of affirmance in the event that certiorari should be granted.

2. Petitioners assert conflict with *Willenbrock* v. *Rogers*, 255 F. 2d 236 (C.A. 3). The contest there was over the "residence" of an American citizen who went to Germany for a temporary stay, lived there from 1932 to 1949 (first to care for an elderly parent and then to preserve her inheritance) and thereafter, believing her American citizenship had been lost, entered the United States as a quota immigrant seeking to regain her American citizenship. After ruling in favor of the government on the issue of residence, the court adverted to the fact that the vesting orders involved were issued in 1947 and 1950. Although the point had not been briefed or argued, the Third Circuit ruled that, as to the 1950 vesting order, the case should be remanded to the trial court for a determination as to whether or not plaintiff had changed her residence before the 1950 vesting order. The case was subsequently settled out of court. To the extent that this somewhat interlocutory ruling supports the proposition that enemy status under the Act may be shed by removal of residence, it is inconsistent with the *Ochmichen* and *La Mola* cases, *supra*, where the claimants were denied recovery of property which had been vested after they had left enemy territory and while they were residing in neutral or allied countries. The same arguments presented on behalf of the present petitioners were advanced in the unsuccessful petitions filed in *Ochmichen* and *La Mola*. The question has become less important with the passage of time and there appear to be no new or intervening circumstances which would warrant grant of the writ in the instant case.

3. Petitioners suggest that a constitutional question is raised by holding that property may be taken from an owner who "formerly resided in enemy territory"

(Pet. 23). But certainly Congress may treat as an enemy one who was a citizen and resident of a foreign country during the period when that country was at war with the United States. Indeed, petitioners themselves do not dispute that the very property here in issue could have been taken, without any possibility of objection on constitutional or statutory grounds, between 1941 and 1946. It is frivolous to suggest that if that were sufficient enemy connection to justify seizure of the property, the United States could not constitutionally take the same property, thereafter. Petitioners argue that when an enemy leaves enemy territory he may no longer be subject to effective enemy control and that this obviates the need to take his property in the interest of avoiding its possible utilization by the enemy country. The short answer is that the war power has a broader reach and fully sustains the taking of enemy or enemy-tainted property for purposes of this country's affirmative use, including reparations. See *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480; *Propper* v. *Clark*, 337 U.S. 472. If there were a constitutional question, moreover, it would not follow that Section 9(a) might be rewritten to afford a remedy to persons in terms barred by the Act. It would seem, rather, that a remedy would lie in the Court of Claims by way of a suit for just compensation under the Fifth Amendment. See *Cities Service Co.* v. *McGrath*, 342 U.S. 330, 335; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479-480; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481. See also the government's brief in opposition filed in *Bank Voor Handel En Scheep-*

vaart, N.V., et al. v. Kennedy, et al., October Term, 1960, No. 958. Petitioners have not filed such a suit.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1962.

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[6] Petitioners may now be barred from proceeding in the Court of Claims by the statute of limitations. See *Soriano v. United States*, 352 U.S. 270. But the failure to pursue this avenue is one with which petitioners are chargeable, especially since it has long been settled that Section 9(a) is unavailable to one who falls within the Section 2 definition of "enemy".

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